



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

October 29, 2012

Mr. Robert Bennett, Acting Director
Division of Stormwater Management
Virginia Department of Conservation and Recreation
900 East Main Street, 8th Floor
Richmond, Virginia 23219

Re: Arlington County Municipal Separate Storm Sewer System (MS4) Permit (VA0088579)

Dear Mr. Bennett:

In accordance with the Memorandum of Understanding Regarding Permit and Enforcement Programs Between the State Water Control Board and the Regional Administrator, Region III Environmental Protection Agency (EPA or the Agency) (March 31, 1975, as amended) (hereinafter, MOU), and pursuant to 40 CFR §123.44, EPA has reviewed the above referenced National Pollutant Discharge Elimination System (NPDES) draft permit received from your office on July 31, 2012. On August 30, 2012, EPA issued a general objection and time extension request for the full 90-day review period.

On September 21, 2012, EPA sent written comments and a marked-up Municipal Separate Storm Sewer System (MS4) NPDES permit for Arlington County to the Virginia Department of Conservation and Recreation (DCR). In that letter, EPA requested that DCR address those comments and/or make changes as requested by EPA. Since DCR has not provided a revised permit and/or otherwise addressed EPA's comments and as the time extension expires on October 29, 2012, EPA is providing this specific objection to the issuance of the referenced permit pursuant to 40 C.F.R. §§ 123.44(b) and (c) and Section III of the MOA since our time extension expires on October 29, 2012. As further explained herein, EPA believes that several substantive requirements for MS4 permits, as required by the federal Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (CWA), and its implementing regulations, have not been incorporated into the draft Arlington County permit.

EPA's objections to the draft permit and identification of revisions needed before EPA can remove the objection, *see* 40 C.F.R. § 123.44(b)(2)(ii), are described below. All references are to the July 31, 2012 draft NPDES MS4 permit sent to EPA. EPA includes the enclosed



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mark-up of that draft permit for your convenience and information, and the proposed changes made in that document are incorporated herein.

I. Required Changes and basis for objection in accordance with 40 CFR § 123.44(c)

To resolve this portion of EPA's objection, DCR must add language which specifically prohibits discharges from the MS4 that cause or contribute to any violation of water quality standards, such as the language provided above, or other language EPA may find acceptable.

EPA also requests that DCR consider adding other language suggested in the comments and marked permit enclosed with this letter and those comments are incorporated herein.

1. Water Quality Standards

The first basis for objecting is that the effluent limits of the draft permit fail to satisfy the requirements of 40 CFR 122.44(d). See 40 C.F.R. § 123.44(c)(8). Federal regulations require that all NPDES permits contain limitations to control discharges which may cause, have the reasonable potential to cause or contribute to an excursion above water quality standards, 40 C.F.R. § 122.44(d)(1)(i), and in addition may not provide less stringent requirements than previously issued permits (backsliding). In addition federal requirements that the permit may not contain less stringent requirements than those included in previously issued permits (backsliding). See 33 U.S.C. 402(o); 40 C.F.R. § 122.44(l). Below is a list of sections in the draft permit that are included in this portion of the objection.

Part I.A.1.a: Only discharges that comply with this permit may be authorized to discharge under the permit. Therefore the language in 1.a should be modified to read: "This permit authorizes the discharges of *stormwater that comply with the requirements of this permit* from all existing..."

Part I.A.1. a.b.3: There are several types of discharges on this list of non-stormwater discharges that are not authorized by statute or regulation, and which EPA believes may cause water quality impairments and should therefore not be automatically exempt from controls. Therefore please delete the following from this list: l) water from crawl space pumps; o) individual residential car washing; r) street wash water; and t) other similar activities. In particular the final item (other similar activities) provides an unacceptable loop-hole.

Part I.A.2: Please make the following or similar edit to the language in this section (provided in the enclosure). Some of these requested changes are based on the language of the 2002 permit currently in effect regarding these controls and EPA's determination that the requirements in the proposed permit are less stringent than the current permit regarding the implementation requirements and enforceability of the MS4 Program plan.

"This permit establishes the specific requirements applicable to the permittee for the term of this permit. The permittee is responsible for compliance with this permit. *The permittee shall implement and refine the MS4 Program Plan (as set forth in Part I.B) to ensure compliance*

with this permit. Discharges may not cause or contribute to an exceedance of a water quality standard. Where wasteloads have been allocated for pollutant(s) of concern in an approved TMDL, the permittee shall implement the special conditions of this permit for attainment of the relevant WLAs. Compliance with the requirements of this permit shall constitute adequate progress for this permit term: ***to reduce the discharge of pollutants to the maximum extent practicable; consistent with the assumptions and requirements of the applicable TMDL wasteload allocations; and toward achieving applicable*** ambient water quality standards.”

It is especially critical that the permit is clear that compliance with its provisions constitutes adequate progress towards attainment of water quality standards and wasteload allocations for *this permit term only*. Compliance with this permit provides no assurances about long-term objectives. The above edits also reflect consistency with requirements set forth in the 2002 permit, as well as with regulatory language.

Part I.A.6. MS4 Program Plan: It is very important that the Plan not just be maintained, but also implemented and enforced. 40 CFR §§ 122.26; 122.41(a); 122.47; and 123.44(c)(7). Please modify the language as follows (or something similar):

“The permittee shall maintain, implement and enforce an MS4 Program Plan accurately...”

Part I.B. Stormwater Management:

The edits outlined for Part I.A.2 should be inserted here as an introduction to the Plan.

“The permittee shall maintain, implement and enforce an MS4 Program Plan to ensure compliance with this permit. Compliance with the requirements of this permit including the MS4 Program Plan shall constitute adequate progress for this permit term to reduce the discharge of pollutants: to the maximum extent practicable; consistent with the assumptions and requirements of the applicable TMDL wasteload allocations; and toward achieving applicable ambient water quality standards. The following subparts describe among other things requirements for the permittee to implement its MS4 Program during this permit term.”

This permit should also define, either here or in the definitions section, what the Stormwater Master Plan actually is, including that it consists of (among other things) any plan, strategy, schedule or analysis completed in fulfillment of the requirements of this permit.

Part I.B.2.i. Storm Sewer Infrastructure Management. EPA expects several edits to this section to improve implementation and enforceability, rather than just continued planning. Expected edits should include but not be limited to actual repair and replacement of outfalls scoring either a 4 or 5 on the completed County outfall evaluation.

Part I.B.2.j.1(d). Containment of leaks should be immediate. Clean-up and disposal should be within 24-hours.

Part I.G. Definitions. EPA provides some important clarifications to the following definition:

“‘Maximum extent practicable’ or ‘MEP’ means the ~~technology-based~~ discharge standard for

municipal separate storm sewer systems established by CWA § 402(p). MEP is achieved, in part, by selecting and implementing effective structural and nonstructural best management practices (BMPs) and rejecting ineffective BMPs and replacing them with effective best management practices (BMPs). MEP is a periodic determination made by the permitting authority, in this case, the Department, an iterative standard, which evolves over time as urban runoff management knowledge increases with the ultimate goal of reducing MS4 discharges to attain and maintain applicable water quality standards in the receiving waters. As such, the operator's MS4 program must continually be assessed and modified to incorporate improved programs, control measures, BMPs, etc., to attain compliance with water quality standards.”

2. Incorporation of Wasteload Allocations

EPA also objects to the draft permit failing to satisfy the requirements of 40 CFR 122.44(d) because of its failure to incorporate wasteload allocations. *See* 40 CFR 123.44(c)(8). Specifically, the following objections are based on the requirements that where the State or EPA has established a TMDL for an impaired water that includes WLAs for storm water discharges, permits must contain effluent limits and conditions consistent with the requirements and assumptions of the WLAs in the TMDL. 40 CFR § 122.44(d)(1)(vii)(B).

Part I.D.1. Special Provisions. The elements of this Part of the Permit are critical toward attainment of WLAs and water quality standards. EPA recognizes that DCR is providing a planning period for the County to determine measures and schedules for implementation. Accordingly, it is very important that these elements, when determined, be both: 1) subject to public notice and comment, and 2) subject to DCR review and approval. In its mark-up of the draft document, EPA has provided a number of language suggestions including a permit provision setting forth the terms of the DCR review and decision process, as well as expected edits to make these expectations very clear. In addition, schedules and compliance deadlines are critical. EPA has included edits to ensure that there is no ambiguity regarding schedules. Those comments are incorporated herein.

EPA also believes that more clarity is needed about the objectives and content of the TMDL Implementation Plans, both for the Chesapeake Bay and other applicable TMDLs:

1. The plans must include the estimated dates (i.e. the compliance schedule) by which WLA attainment is expected to be achieved, and these should be placed on fairly aggressive schedules. For the MS4 discharges to the Chesapeake Bay, those schedules should be consistent with the assumptions and requirements of the TMDL WLAs and Virginia's Watershed Implementation Plans (WIPs)
2. The permit must include milestones with at least two-year frequencies. These milestones must be enforceable. Milestones that are more than five years away may be modified in future permit terms and in updates to the Plan, but during the current permit term must be enforceable permit provisions.
3. For the purpose of adaptive management, unenforceable benchmarks with more than two-year frequencies may be utilized to ensure that adequate planning, funding and administrative activities occur to keep implementation on schedule.

Part I.D.2. Chesapeake Bay TMDL Action Plan Implementation. The permit should be very clear that the Plan to be implemented is one approved by DCR, and that implementation is per the permit schedule, *not* a subsequent determination by the permittee of what it considers to be the maximum extent practicable (MEP). The determination of MEP is within the province of the permit-issuing authority and cannot be delegated to permittees. Also, as noted above, compliance with this permit may demonstrate adequate progress towards achieving the necessary WLAs for this permit term only, not long-term. Accordingly, the following edits are critical (provided in the attached red-line strike-out of the permit):

The operator shall implement the TMDL action plan as approved or conditioned by the Department and according to the schedule therein. Compliance with this requirement demonstrates adequate progress for this permit term towards achieving TMDL wasteload allocations consistent with the assumptions and requirements of the TMDL and shall be included in annual reports subsequent to the submission of the Chesapeake Bay Action Plan.

For the purposes of this permit, the implementation of the following represents the minimum requirements of the TMDL action:....

Part I.D.1. Other TMDL Action Plans. All applicable TMDLs currently in effect should be identified by name in the permit, including the date of establishment/approval, the pollutants and the applicable WLA (or summary of DCR's determination of what are considered consistent effluent controls and/or BMPs with the respective WLA).

Part I.D1.a) As noted with respect to the Chesapeake Bay TMDL plan, *supra*, the permit must be clear that any additional plan(s) are also subject to DCR review and approval.

Part I.D.1.b) TMDL Action Plan Elements. The Plan(s) must include estimates of when the relevant WLAs are expected to be achieved, even if they will not occur during the current permit term. The Plan should be a blue-print for attainment. While EPA acknowledges that more detailed short-term planning and adaptive management may take place in subsequent permit terms, final attainment cannot not be open-ended.

Part I.G. Definitions. EPA provides some important clarifications to the following definition:

“‘Wasteload allocation’ or ‘Wasteload’ or ‘WLA’ means the portion of a receiving water's loading or assimilative capacity allocated to one of its existing or future point sources of pollution. WLAs are a type of water quality-based effluent limitation. ~~This permit requires the use of WLAs as benchmarks for design, evaluation and iterative implementation of the MS4 Program.~~”

Under **no** circumstances should WLAs be characterized as unenforceable objectives.

II. Recommended Changes

EPA also strongly recommends that DCR address the following comments and edits for inclusion in the County's permit.

Part I.B.2.c. Retrofitting on Prior Developed Lands: EPA would like to see the following or similar edits in order to improve clarity, progressive implementation and enforceability (provided in red-line strike-out in our September 21, 2012 letter):

“Within XX months the permittee shall select at least seven (7) retrofit projects from its watershed retrofit plans **and ensure** for implementation of those projects within the County right-of-way or on specific County properties **by no later than 60 months after the Effective Date of this permit. The permittee shall submit a summary of the projects and the schedule for implementation to the Department.** The permittee may substitute alternative retrofit projects if opportunity exists provided that similar screening is applied to the substituted project as that in the watershed retrofit plans.

In addition, the permittee shall plant a net increase of 2,000 trees in the MS4 sewershed by no later than 60 months after the Effective Date of this permit. The annual total tree planting shall be calculated as a net increase, such that annual mortality is also included in the estimate.”

Part I.B.2.d 2. Roadways: EPA believes these protocols are notable elements of the MS4 Program Plan and should therefore be required to be submitted to DCR.

“Within 36 months of permit issuance, the permittee shall develop, implement and submit to DCR written protocols...”

Part I.B.2.f. Illicit Discharges and Improper Disposal. EPA expects several edits to this section to improve implementation and enforceability (see draft document), including providing a more aggressive schedule for limiting inflow and infiltration from sanitary sewers into the MS4.

Part I.C. Monitoring Requirements.

In general, EPA would like all monitoring reporting to include synthesis and interpretation of data with respect to relevant WLAs and water quality standards. This information is important not just for data collection, but it can also be used to evaluate whether the receiving waters are improving, or continuing to degrade.

Part I.D.1.a) TMDL Action Plan Development Schedule. EPA endorses the development of a single consolidated TMDL implementation plan for relevant TMDLs to the extent that planning, public notice, administration and implementation is easier for the permittee, and review and approval is no more complicated for DCR.

Part I.D.1.b) Though the permit does outline a methodology for making estimates of the necessary pollutant reductions it is a little less clear on the methodology for estimating the pollutant reductions from management practices chosen to fulfill the reduction. We are aware of

a spreadsheet methodology developed by DCR, but it is not entirely clear in the permit that the permittee must apply that methodology or can use an equivalent one.

Part I.D.2.1. EPA believes that implementation of I.B.2.a) is important to achieving relevant WLAs, but that provisions b) and c) of this Part are also critical.

General Comments:

1. Identified in the draft document are several provisions where additional clarity is needed on compliance dates. Please ensure that it is clear when all provisions are expected to be completed, including interim dates that fall within this permit term if longer-term attainment dates may fall outside of this permit term. The Fact Sheet should also address the basis for not requiring completion during this permit term.
2. In many instances it is more appropriate to have compliance endpoints be "no later than 60 months" (or 5 years), rather than "this permit cycle" in case this permit is administratively extended.
3. Although EPA expects that this permit will be reissued before the expiration date, it is logical to provide for continued implementation in the event of an administrative extension. Both a general provision for continued implementation of the entire program, as well as a requirement to continue implementing the TMDL Implementation Plan(s) per the approved schedules will help to ensure that progress remains steady.

III. Anticipated Changes

EPA and DCR have previously discussed that the Arlington County permit will serve as a template for the other Phase I MS4 Permits in Virginia remaining to be reissued. Based on EPA's review of the most recent draft permit submitted for Arlington County, we expect additional MS4 permits to reflect these changes. At the same time, we also understand that the current Arlington County stormwater program is more sophisticated than many in the state, *and* that several 'template' provisions have been omitted from the Arlington permit (*e.g.*, the identification of retrofit opportunities at County facilities and the evaluation of the Erosion and Sediment Control Program). As a result, and because of the progress of Virginia's municipal stormwater program, EPA expects that the additional Phase I MS4 permits in Virginia will include any additional provisions necessary to ensure that the necessary water quality objectives are met within their unique jurisdictions.

EPA would like to thank DCR for working cooperatively to resolve the remaining issues in an expeditious manner. We have every expectation that a few extra days will allow our respective agencies to come to agreement on the provisions outlined herein. Until the issues are resolved, however, DCR may not issue the Arlington County MS4 permit without written authorization from EPA, in accordance with 40 C.F.R. §122.4(c).

If you have any questions, please contact me or David McGuigan, Associate Director,
Watershed Protection Division, at (215) 814-2158.

Sincerely,

A handwritten signature in black ink, appearing to read "Jon M. Capacasa", with a long horizontal flourish extending to the right.

Jon M. Capacasa, Director
Water Protection Division

Enclosure

cc: Ginny Snead, DCR
Doug Fritz, DCR